ORIGINAL

Supreme Court U.S.
FILED
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ORIGINAL

No. 01-1765

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD EARLY, Warden, et al., PETITIONERS,

vs.

WILLIAM PACKER, RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis.

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

Dated: July 3, 2002

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SUPREME COURT, U.S.

By Elizabeth A. Newman
ELIZABETH A. NEWMAN
Deputy Federal Public Defender

No. 01-1765

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD EARLY, Warden, et al., PETITIONERS,

vs.

WILLIAM PACKER, RESPONDENT.

NOTICE OF FILING RE:
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

PLEASE TAKE NOTICE that respondent hereby files the attached supplemental information in support of his motion for leave to proceed in forma pauperis his.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

Dated: October 17, 2002

ELIZABETH A. NEWMAN
Deputy Federal Public Defender

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, William Packer, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment (prison-assigned job)	$ 12	$	$ 12	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 12	$	$ 12	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None (other than prison-assigned jobs)			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$ None	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$ None	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify):	$ 0	$
Total monthly expenses:	$ 0	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

In 1994, while incarcerated, I married. My wife is an attorney with the Office of the Federal Public Defender. Prior to the marriage, my wife and I entered into an agreement. By the terms of that agreement, I have no interest in or rights to any of my wife's property, assets or income. In 1999, I was granted (over)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 17, 2022

William Parker

(Signature)

FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
321 EAST 2nd STREET
LOS ANGELES, CALIFORNIA 90012-4202
213-894-2854
213-894-0081 FAX

MARIA E. STRATTON
Federal Public Defender
DENNIS J. LANDIN
Chief Deputy

CRAIG WILKE
Directing Attorney
Santa Ana Office
OSWALD PARADA
Directing Attorney
Riverside Office

Direct Dial: 213-894-7730

September 20, 2002

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Early v. Packer, No. 01-1765

Dear Sir or Madam:

Per Ms. Newman's instructions, enclosed for filing, in the above-referenced matter, is the original and ten copies of the Notice of Fling Re: Motion for Leave to Proceed in Forma Pauperis. Please conform the enclosed copy of the cover page and return it in the enclosed self-addressed envelope.

If you have any questions, please do not hesitate to call Ms. Newman at the number listed above.

Very truly yours,

Isabel Rivera, Interim Secretary to
Elizabeth A. Newman
Deputy Federal Public Defender

Faxed 9-27-02

Enclosures

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SUPREME COURT, U.S.

ORIGINAL

No. 01-1765

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD EARLY, Warden, et al., PETITIONERS,

vs.

WILLIAM PACKER, RESPONDENT.

NOTICE OF FILING RE:
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

PLEASE TAKE NOTICE that respondent, by his undersigned counsel, hereby files the attached printout of his prison trust account in support of his motion for leave to file in forma pauperis his opposition to the petition for writ of certiorari.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

Dated: September 20, 2002

By Elizabeth A. Newman
ELIZABETH A. NEWMAN
Deputy Federal Public Defender

RECEIVED
SEP 27 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CALIFORNIA DEPARTMENT OF CORRECTIONS
NORTH KERN STATE PRISON
INMATE TRUST ACCOUNTING SYSTEM
INMATE TRUST ACCOUNT STATEMENT

FOR THE PERIOD: AUG. 01, 2001 THRU AUG. 05, 2002

ACCOUNT NUMBER : H45835 BED/CELL NUMBER: FAB4T2000000233L
ACCOUNT NAME : PACKER, WILLIAM ACCOUNT TYPE: I
PRIVILEGE GROUP: A

TRUST ACCOUNT ACTIVITY

DATE	TRAN CODE	DESCRIPTION	COMMENT	CHECK NUM	DEPOSITS	WITHDRAWALS	BALANCE
08/01/2001		BEGINNING BALANCE					0.00
ACTIVITY FOR 2002							
04/02	D300	CASH DEPOSIT	2638/0928		200.00		200.00
04/08	D320	TRUST FUNDS T	2744/CCI		0.84		200.84
04/11	FC02	DRAW-FAC 2	2785/3A 2D			100.00	100.84
04/22	W521	FUND RAISER C	2880/PIZZA			1.00	99.84
04/22	W350	SPECIAL PURCH	2880/PIZZA	154030231		50.80	49.04
05/07	D554	INMATE PAYROL	3025/APR96		4.84		53.88
05/08	D300	CASH DEPOSIT	3029/1201		200.00		253.88
05/15	W425	DONATION-A A	3123/KFC			2.00	251.88
05/15	D320	TRUST FUNDS T	3128/CCI		12.00		263.88
05/15	W350	SPECIAL PURCH	3123/KFC	154030428		43.94	219.94
05/16	FC02	DRAW-FAC 2	3136/3A 2D			150 00	69.94
06/06	D554	INMATE PAYROL	3301MAY138		12.00		81.94
06/12	D300	CASH DEPOSIT	3373/1464		200.00		281.94
06/13	FC02	DRAW-FAC 2	3388/2D 3A			150.00	131.94
07/03	D300	CASH DEPOSIT	0042/1575		200.00		331.94
07/08	D554	INMATE PAYROL	0055/JUN79		12.00		343.94
07/18	FC02	DRAW-FAC 2	0193/3A 2D			180.00	163.94
08/02	W502	POSTAGE CHARG	0353/R&R			3.23	160.71

TRUST ACCOUNT SUMMARY

BEGINNING BALANCE	TOTAL DEPOSITS	TOTAL WITHDRAWALS	CURRENT BALANCE	HOLDS BALANCE	TRANSACTIONS TO BE POSTED
0.00	841.68	680.97	160.71	0.00	0.00

CURRENT AVAILABLE BALANCE
160.71

No. 01-1765

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD EARLY, Warden, et al., PETITIONERS,

vs.

WILLIAM PACKER, RESPONDENT.

CERTIFICATE OF SERVICE

I, Elizabeth A. Newman, hereby certify that on this 20th day of September, 2002, a copy of Notice of Filing Re: Motion for Leave to Proceed in Forma Pauperis was mailed, postage-prepaid, to Kenneth N. Sokoler, Deputy Attorney General, 300 South Spring Street, Los Angeles, California 90013, counsel for the petitioners.

Respectfully submitted,

Dated: September 20, 2002

Elizabeth A. Newman

ELIZABETH A. NEWMAN
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone No. (213) 894-7730

Attorney for Respondent
William Packer

No. 01-1765

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD EARLY, Warden, et al., PETITIONERS,

vs.

WILLIAM PACKER, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

MARIA E. STRATTON
Federal Public Defender
ELIZABETH A. NEWMAN
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone (213) 894-7730

Attorneys for the Respondent

QUESTIONS PRESENTED

This case involves a finding of juror coercion. Petitioners do not dispute that the verdict was coerced. The only issue before the Court is whether relief was properly granted.

Petitioners contend that the circuit court erred in granting relief because the state-court decision was not "contrary to" governing Supreme Court precedent. This Court has found that a judge coerces a verdict when he does not simply urge the jury to continue to deliberate, but rather urges the jury to reach a decision -- even if he does not urge the jury to reach a particular decision. *United States v. United States Gypsum Co.*, 438 U.S. 422, 459-62, 98 S. Ct. 2864, 2884-86 (1978). This Court has also held that claims of juror coercion must be evaluated according to a totality test. *Lowenfeld v. Phelps*, 484 U.S. 231, 237, 108 S. Ct. 546, 550 (1988). Here, the state-court decision explicitly stated that a judge may properly urge a jury to reach a verdict, as long as he does not urge it to reach a particular verdict. The state-court decision also impliedly stated that some events surrounding claims of juror coercion need not be evaluated at all and that those events that a reviewing court does evaluate may be evaluated singly, in isolation.

Petitioners' petition presents the following questions:

1. Whether the state-court decision expressed and applied laws that are contrary to governing Supreme Court precedent?

2. Whether clearly established Supreme Court law controls this case?

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OPPOSITION TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Respondent William Packer hereby opposes petitioners' petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I

OPINIONS BELOW

The second amended opinion of the United States Court of Appeals is reported at 291 F.3d 569 (9th Cir. 2002). It appears at App. 1a. The first amended opinion of the United States Court of Appeals is reported at 277 F.3d 1092 (9th Cir. 2002) and appears at App. 1b. The original opinion of the United States Court of Appeals appears at App. 1c. The opinion of the district court is unreported. It appears at App. 1d. The district court's order adopting the findings, conclusions, and recommendation of the magistrate judge is unreported. It appears at App. 1e. The amended report and recommendation of the magistrate judge is unreported. It appears at App. 1f. The order of the California Supreme Court denying review is unreported. It appears at App. 1g. The opinion of the California Court of Appeal is unreported. It appears at App. 1h.

II

JURISDICTION

Final judgment of the Ninth Circuit Court of Appeals was entered on May 6, 2002. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. Title 28, Section 2254(d), United States Code

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

IV

STATEMENT OF THE CASE

A. Jurisdiction in the Courts Below

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The circuit court had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

B. Facts Material to Consideration of the Questions Presented

1. The jury deliberations in respondent's case

Respondent William Packer was charged in California court in 1987 with a number of offenses, including robbery, murder, and assault. After more than twenty hours of jury deliberations, a juror, Eve Radcliff, sent a note to the trial judge asking to be dismissed. In a meeting outside the presence of respondent or any of the attorneys, the judge asked her to continue, telling her that, if she could not, "they have to start deliberations all over again with another person." App. 8a-9a.

The next day, the jury foreman wrote a note to the judge telling him that Ms. Radcliff -- whom he named by name -- was refusing to follow the law: "I feel that if we continue we will end up as a hung jury, not based on facts and evidence, but one person's inability to reason or desire to be unreasonable." App. 10a.

The judge read this note to the jury in open court, in the presence of respondent and all of the attorneys. He then asked the foreman whether the jury was deliberating. The foreman told him that the jury was deliberating but that the members disagreed over the proper interpretation of "the laws as given to us" and that "one person's interpretation is inflexible in their view." App. 10a-11a. The judge asked the foreman what the ballot split was, and the foreman told him that it was 11-1 and had been 10-2 just before that. Obviously, Ms. Radcliff was the lone holdout.

The judge then told Ms. Radcliff that she must apply the facts to the law and that "[t]he law is right there" in the jury instructions. The judge repeated several

times that the jurors must "accept and follow the law." He encouraged the jury to take the next day off and try to "make further progress" on the following day because "what you're saying to me is there's a possibility you could reach a verdict." At no point did he admonish the jurors that they had a right and a duty to maintain their conscientiously-held beliefs. App. 11a-12a.

On the next day of deliberations, Ms. Radcliff wrote a note to the judge in which she characterized the events of the previous court day as a "public beating." She wrote that she had known nothing of the foreman's note accusing her of refusing to deliberate until moments before the note had been read in court, that she was now "struggling with a feeling of distrust and disrespect from the other jurors," that she could no longer be impartial, and that she wanted to be dismissed from the jury. The judge read this note to counsel and said that he was going to call Ms. Radcliff into chambers. Defense counsel objected that Ms. Radcliff was being singled out and that the judge's conduct would cause her to change her vote or be excused. Nevertheless, the judge called Ms. Radcliff into chambers.

In chambers, Ms. Radcliff told the judge that she had interpreted the "public beating" session as an indication that "things weren't going the way that they were supposed to go" and as a sign that the other jurors "weren't getting from me the type of responses that they wanted" because she refused to accept their line of reasoning. The judge sent her back to the jury room and interviewed the foreman, who told him that Ms. Radcliff was deliberating. App. 12a-14a.

The next day, Ms. Radcliff sent the judge another note asking to speak with him alone. The judge did not meet with her or respond to her in any way. That afternoon and the following morning, the jury reached its verdicts on the only two counts remaining. App. 14a-15a.

2. State court appellate opinion

After his conviction and sentence, respondent appealed, alleging, among other grounds, that the verdicts had been coerced. In rejecting his argument, the state appellate court did not cite to any federal caselaw.

Claims of juror coercion must be evaluated under a totality test. *Lowenfeld*, 484 U.S. at 237, 108 S. Ct. at 550. The state court briefly evaluated three incidents: the judge's statement to Ms. Radcliff that deliberations would have to begin again if she were excused; the judge's failure to tell the jurors that they must not abandon sincerely-held beliefs; and the judge's urging that the jury consider the matter further with the view to reaching an agreement. App. 15h. The state court did not discuss the cumulative effect of these three incidents on the jury. Instead, it looked at the incidents singly, in isolation. Nor did the state court consider the following events: the judge's inquiry into the numerical split of the jury; the judge's discovery that the numerical split had moved from 10-2 to 11-1; the judge's knowledge that Ms. Radcliff was the lone holdout, and her knowledge that he knew this; and the judge's action in reading the foreman's note out loud in front of the jury, identifying Ms. Radcliff by name as the holdout juror, and chastising her (as she perceived it) for not following the law. Because the state court did not consider these incidents, it never discussed their effect on the jury, singly or cumulatively. App. 15h.

A judge may be coercive if he does not simply urge the jury to continue its deliberations, but rather pressures the jury to arrive at a verdict, even if he does not pressure the jury to arrive at a *particular* verdict. *United States Gypsum Co.*, 438 U.S. at 459-62, 98 S. Ct. at 2884-86 (judge implied that he wanted jury to reach a verdict "one way or the other"). But the state court did not set out that governing standard, and it did not discuss any of the events of the deliberations under that standard. App. 15h. On the contrary. It stated, "[T]here is nothing improper in

urging the jury to consider [a case] further with the view to reaching an agreement as long as the language used does not coerce a particular type of verdict." App. 15h-16h (citations omitted).

3. Federal appellate opinion

After exhausting his state remedies, respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. One of his claims was that the jury verdicts in his case had been coerced. The district court denied his petition, and the circuit court reversed.

Because respondent filed his petition after April 24, 1996, the amendments to 28 U.S.C. § 2254 under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") apply. *Williams v. Taylor*, 529 U.S. 362, 402, 120 S. Ct. 1495, 1518 (2000). Under AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner if the state court's rulings "resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The circuit court found the state court's decision to be deficient in two separate ways. First, it held that *Lowenfeld*, *supra*, *Brasfield v. United States*, 272 U.S. 448, 47 S. Ct. 135 (1926), and *Burton v. United States*, 196 U.S. 283, 25 S. Ct. 243 (1905), stand for the proposition that a reviewing court must evaluate a judge's comments and conduct under a totality test to see whether the defendant's right to an uncoerced jury verdict has been infringed. App. 18a & n.8. The circuit court found that the state court had neither expressed nor applied this proposition. This legal principle never appeared explicitly in the state court's decision, and the state court had failed to apply it: It had failed to evaluate all of the events of the jury's deliberations, and it had not evaluated any of the events under a totality test. Instead, the state court had omitted

from its consideration the majority of the events and had considered the remainder singly, in isolation. App. 20a.

The second way in which the state-court decision was deficient was that it had made a statement of law contrary to Supreme Court precedent. That incorrect statement was that a judge may pressure a jury to reach a verdict as long as he does not pressure the jury to reach a particular verdict. App. 20a. These two distinct deficiencies caused the circuit court to conclude that "the state court's decision was contrary to clearly established Supreme Court law, not only because it failed to apply the governing law, but also because its partial rationale directly contradicted Supreme Court precedent." App. 20a (citations omitted).[1]

The federal court then turned to the question whether the state court had reached an erroneous decision that warranted the issuance of the writ. App. 20a (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1721-22 (1993)). It found that the verdict had been coerced -- a finding that petitioners do not challenge. At the conclusion of its analysis, the circuit court remanded the case with an order to grant the writ. App. 20a-26a.

[1] Petitioners contend that the state-court decision did not endorse the notion that a trial judge may urge a jury to reach a verdict. Instead, say petitioners, the state-court decision merely endorsed the notion that a trial judge may urge a jury to deliberate further "with the view to reaching an agreement." Petition at 15 n.6. The plain meaning of "reaching an agreement," however, is "reaching a verdict."

V

REASONS FOR DENYING THE WRIT

28 U.S.C. § 2254, as amended by the AEDPA, permits a federal court to grant a writ of habeas corpus if the underlying state-court decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, this Court held that a state-court decision is "contrary to" Supreme Court precedent if it is "substantially different from the relevant precedent of this Court . . . . A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." 529 U.S. at 405, 120 S. Ct. at 1519.

Here, petitioners contend that the state-court decision in this case was not contrary to relevant Supreme Court precedent. They also argue that no relevant Supreme Court precedent exists. Petitioners' arguments are incorrect. *Lowenfeld* and *United States Gypsum Co.*, among other cases, are binding Supreme Court precedent. The state-court decision is contrary to both of them. For this reason, the petition should be denied.

A. The State-Court Decision is Contrary To Supreme Court Precedent

1. The state-court decision expressly and impliedly articulated legal rules that contradict governing Supreme Court law

The state court in this case explicitly expressed and applied the following rule: "[T]here is nothing improper in urging the jury to consider [a case] further with the view to reaching an agreement as long as the language used does not coerce a particular type of verdict." App. 15h-16h (citations omitted). In addition, the state court implicitly employed two additional rules: that a court reviewing a claim of juror coercion need not evaluate every incident in connection with the claim, and that

those events that the reviewing court does examine should be evaluated singly, in isolation, rather than under a totality test. *See* App. 15h-16h.

None of these rules is a correct expression of controlling Supreme Court precedent. A judge may encourage a jury to continue to deliberate, but he may not urge a jury to reach a verdict -- even if he does not urge the jury to reach a particular verdict. *United States Gypsum Co.*, 438 U.S. at 459-62, 98 S. Ct. at 2885-86. A court reviewing a claim of juror coercion must consider all incidents relevant to the claim, and must consider them cumulatively, under a totality test. *Lowenfeld*, 484 U.S. at 237, 108 S. Ct. at 550.

A state-court decision is "contrary to" this Court's precedent if it is "substantially different from" that precedent or if "the state court applies a rule that contradicts the governing law set forth in our cases." *Williams*, 529 U.S. at 405, 120 S. Ct. at 1519. Here, as discussed above, the state court's ruling in respondent's case is "substantially different" from this Court's precedent. It "contradicts the governing law" in this Court's cases. There is no other way to describe a state court decision that holds that a trial court may rule in a way that this Court prohibits, or that a reviewing court may examine a legal issue in a manner opposite to the one that this Court requires.

2. <u>The state-court decision is not simply a poorly-drafted expression of governing Supreme Court law</u>

Petitioners appear to contend as well that the state court actually did apply this Court's governing precedent but simply articulated it badly. Petition at 7-8, 13. An examination of the state-court decision, however, does not bear that out.

A judge may encourage a jury to continue to deliberate but may not urge a jury to reach a verdict. *United States Gypsum Co.*, 438 U.S. at 459-62, 98 S. Ct. at 2884-86. Petitioners appear to concede that the state court in this case expressly endorsed

precisely the conduct that *U.S. Gypsum* prohibits. It is difficult to see how a statement of law that explicitly contradicts this Court's precedent can be said simply to have clumsily articulated that precedent.

Claims of juror coercion must be evaluated under a totality test. *Lowenfeld*, 484 U.S. at 237, 108 S. Ct. at 550. The state court did not do that here. App. 15h-16h. The state court first considered the trial judge's statement to Ms. Radcliff that deliberations would have to begin anew if she were excused. App. 15h. It found no error. *Id.* The court next considered the judge's failure to caution the jury not to surrender sincerely held views during the "public beating" session. *Id.* It found no error. *Id.* The court next considered whether the judge had erred in urging the jury to keep deliberating with a view to reaching a verdict. *Id.* It stated that there was "nothing improper" in what the judge had said. App. 15h-16h. At no point did the state consider the way in which these three events might have combined to coerce a verdict. And at no point did the state court consider any of the other events of the deliberations: the judge's inquiry into the numerical split of the jury; the judge's discovery of the movement of the jury's balloting from 10-2 to 11-1; the judge's knowledge that Ms. Radcliff was the lone holdout, and her knowledge that he knew this; or the judge's action in reading the foreman's note out loud in front of the jury, identifying Ms. Radcliff by name as the holdout juror, and chastising her (as she perceived it) for not following the law. Thus, at no point did the state court consider the way in which the other, unevaluated events might have combined to coerce a verdict.

The state court's decision thus did not embody a correct statement of this Court's precedent. It embodied a statement of law that contradicted that precedent -- a statement of law that was contrary to that precedent.

3. **The state-court decision is not simply a scantily-reasoned expression of governing Supreme Court law**

Petitioners also argue that the state court's decision in this case is not "contrary to" Supreme Court law because reviewing courts must, under the AEDPA, defer to state-court decisions that contain sparse or no reasoning. Petition at 14. What petitioners omit is that virtually all of the cases on which they rely involve claims of unreasonable application of Supreme Court precedent. (The exception is *Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000). The circuit court in that case held that no clearly established Supreme Court law existed at the time of petitioner's conviction. *Id.* at 944.) By definition, claims of unreasonable application of Supreme Court precedent involve state-court decisions that have correctly set forth relevant Supreme Court precedent. *Williams v. Taylor*, 529 U.S. at 407-08, 120 S. Ct. at 1520. Thus, in *none* of petitioners' cases did the state court set forth an incorrect governing standard. *None* of the cases was fully litigated under the "contrary to" prong of § 2254.

By contrast, the circuit court in this case was not confronted with a state-court decision that set forth the proper standard but contained little or no reasoning. The state-court decision in this case impliedly rested on the *wrong* standard -- that a coercion case need not be evaluated under a totality test. Moreover, to the degree that the decision explicitly set forth *any* standard, it set forth the *wrong* standard -- that a judge may urge the jury to reach a verdict as long as he does not urge it to reach a particular verdict. In other words, the state-court decision rested on conclusions of law that were opposite to those reached by this Court. That is the textbook definition of a decision that is "contrary to" Supreme Court precedent.

B. Clearly Established Supreme Court Law Controls this Case

The petitioners' final argument reduces to the contention that no clearly established Supreme Court law governs this case: that *Lowenfeld* sets forth no test

for assessing claims of juror coercion, and that *United States Gypsum Co.* was decided under the Court's supervisory powers. Petition at 12 n.5, 14-15. That is incorrect. Clearly established Supreme Court law governs this case and compels rejection of petitioners' petition.

"Any criminal defendant . . . being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfeld*, 484 U.S. at 241, 108 S. Ct. at 552. *Lowenfeld* sets forth a clear test for evaluating claims of juror coercion. The case arose under 28 U.S.C. § 2254. Thus, the resolution of the petitioner's claims necessarily depended on the controlling interpretation of the Constitution. The Court's discussion of the legal issues began, "Our review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court 'in its context and under all the circumstances.'" *Lowenfeld*, 484 U.S. at 237, 108 S. Ct. at 550 (citing *Jenkins v. United States*, 380 U.S. 445, 446, 85 S. Ct. 1059, 1060 (1965)). Petitioners imply that this statement does not set forth a test for evaluating claims of juror coercion, but rather, perhaps, is an improvised tool to be used in *Lowenfeld* alone. Petition at 12 n.5. The plain terms of the statement, however, show that it is a general framework -- a test -- against which claims such as respondent's may be assessed.[2]

Similarly, it is clearly established Supreme Court law that a judge coerces a verdict when he urges a jury to reach a verdict (as opposed to urging the jury to continue its deliberations). *United States Gypsum Co.*, 438 U.S. at 459-62, 98 S. Ct. at 2884-86. The Court in *Lowenfeld*, which carefully noted that *Jenkins* was based on

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[2] Even if *Lowenfeld* did not set out a test for evaluating claims of juror coercion, there could be no dispute that it clearly states that a coerced verdict is unconstitutional. *Lowenfeld*, 484 U.S. at 241, 108 S. Ct. at 552. No additional clearly established Supreme Court precedent is required under the AEDPA.

the Supreme Court's supervisory power over the federal courts, 484 U.S. at 231 n.2. 108 S. Ct. at 442 n.2, cited *United States Gypsum Co.* in the same paragraph and made no corresponding distinction. 484 U.S. at 231, 108 S. Ct. at 552. Nor would such a distinction have been justified. Nothing in *United States Gypsum Co.* suggests that the Court was resting on its supervisory powers when it concluded that the trial judge had improperly "encroached on the jury's authority and had foreclosed a possible 'no verdict' outcome." 438 U.S. at 459, 98 S. Ct. at 2884-85 (citation omitted; internal punctuation omitted). Indeed, the Court stated that the circuit court "would have been justified in reversing the convictions" because of the judge's perceived insistence that the jury reach a verdict. It never suggested that the circuit court would have been acting on its own supervisory authority over the district court had it followed that course of action.

VI

CONCLUSION

For the foregoing reasons, respondent William Packer respectfully requests that this Court deny the petitioners' petition for writ of certiorari.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

Dated: July 3, 2002

By Elizabeth A. Newman
ELIZABETH A. NEWMAN
Deputy Federal Public Defender

No. 01-1765

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD EARLY, Warden, et al., PETITIONERS,

vs.

WILLIAM PACKER, RESPONDENT.

CERTIFICATE OF SERVICE

I, Elizabeth A. Newman, hereby certify that on this 3d day of July, 2002, a copy of Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed, postage-prepaid, to Kenneth N. Sokoler, Deputy Attorney General, 300 South Spring Street, Los Angeles, California 90013, counsel for the petitioners.

Respectfully submitted,

Dated: July 3, 2002

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July 3, 2002

Office of the Clerk
Supreme Court of the United States
Washington. D.C. 20543

Re: Early v. Packer, No. 01-1765

Dear Sir or Madam:

Enclosed for filing in the above-referenced matter are an original and ten copies of Respondent's Motion for Leave to Proceed in Forma Pauperis, Opposition to Petition for Writ of Certiorari, and Certificate of Service. Please conform a the enclosed copies of the cover pages and return them to me in the enclosed self-addressed envelope.

We do not yet have respondent's affidavit establishing his eligibility for in forma pauperis status. I discussed this with Mr. Larson of your office on July 2, 2002. We will send you the affidavit as soon as we receive it.

Thank you for your help. If you have any questions, please do not hesitate to call me.

Very truly yours,

Elizabeth A. Newman
Deputy Federal Public Defender

EAN:me
Enclosures

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